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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

KEVIN LEE JOHNSTON,

Defendant and Appellant.

A121279

**(Solano County
Super. Ct. No. FCR225175)**

Defendant and appellant Kevin Lee Johnston (appellant) was convicted of robbery after he stole beer from a convenience store and used one of the beer bottles to assault the store cashier who pursued him. Among other things, appellant contends the trial court erred in excluding impeachment evidence regarding the employee victim, there is insufficient evidence to support the robbery conviction, the prosecutor committed prejudicial misconduct, and his admission of a prior strike conviction was not voluntary and intelligent. We remand for redetermination of the prior strike conviction allegation but otherwise affirm.

PROCEDURAL BACKGROUND

By amended information dated June 18, 2007, the District Attorney of Solano County charged appellant with second degree robbery (Pen. Code, § 211),¹ mayhem

¹ All undesignated section references are to the Penal Code.

(§ 203), assault with a bottle (§ 245, subd. (a)(1)), and assault with a knife (§ 245, subd. (a)(1)). It also alleged, for each of the offenses, enhancements for use of a knife and for use of a broken glass bottle (§ 12022, subd. (b)(1)), and that an earlier robbery conviction constituted a strike (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)). The trial court dismissed the mayhem count under section 995.

A jury found appellant guilty of robbery and assault with a bottle. The jury was unable to reach a verdict on assault with a knife or any of the alleged enhancements and the trial court dismissed that count and the alleged enhancements. Appellant, through his attorney, admitted the prior strike offense. The trial court found appellant had violated the probation he was serving for the strike offense by committing the current offenses and revoked his probation.

The trial court sentenced appellant to a prison term of five years four months, consisting of the mitigated term of two years for the robbery doubled due to the strike offense and one year four months for the prior robbery conviction. The conviction for assault with a deadly weapon was stayed under section 654.

FACTUAL BACKGROUND

On July 4, 2005, between 5:00 and 5:30 p.m., appellant entered a gas station convenience store, took three beers without paying for them, and left through the emergency exit in the back of the store. He fled on his bicycle. The store cashier, Jagjit Singh, told a customer, Akhtar Ali, that he had seen appellant steal the beer. Ali had just finished paying for his gas.

Singh left the store, followed appellant in his car, and caught up to him in the street, about 150 yards away from the store. Singh got out of his car and confronted appellant on the side of the road, asking him why he had stolen the beers. Ali, who happened upon this confrontation after he left the gas station, saw Singh and appellant arguing.

According to Singh, appellant came at him with a knife and Singh grabbed appellant's hand. Appellant grabbed one of the stolen beer bottles from a bag on his bicycle and hit Singh on the head with the bottle. Ali saw appellant take a bottle from his

bicycle bag, break it on the handlebars, and strike Singh. Singh fell to the ground in pain. Appellant left with the remaining beer in his bicycle bag.

When Fairfield Police Officer Apley arrived at the scene, he observed that Singh smelled of alcohol and had glass in his hair, a cut above his ear, and blood on his hand. Fairfield Police Officer Pereira found appellant riding his bike through a nearby trailer park and detained him after a short pursuit. Singh identified appellant as the attacker. Appellant was arrested, and police discovered in his backpack a folding knife that appeared to have blood on the blade. Appellant admitted taking the beer but claimed Singh had attacked him.

At trial, counsel for appellant did not deny the theft of the beer, but argued that Singh had attacked appellant and both were injured in the confrontation as appellant attempted to defend himself. Appellant's version of the events was admitted through the testimony of Apley. Appellant told Apley that he placed the beer bottles on the ground in an attempt to return them and Singh became upset and attacked him after one of the bottles broke.

DISCUSSION

I. *Appellant Fails to Show Error or Prejudice in the Exclusion of Impeachment Evidence Under Evidence Code Section 352*

Appellant contends the trial court erred in excluding evidence that Singh was terminated from his job for misconduct following the incident giving rise to the present charges. The trial court did not abuse its discretion in excluding the proffered evidence and, in any event, any error was harmless.

Appellant moved in limine to admit evidence that in 2004 Singh was convicted of a misdemeanor, fraudulent use of an access or ATM card (§ 484g). The prosecution did not object, and the trial court ruled the prior conviction was admissible for impeachment of Singh. Appellant also sought to admit evidence of "other misconduct" by Singh, asserting "[a]dditionally, Mr. Singh was fired for his actions in this case as well as for stealing from a customer just days after this incident." At the hearing on the motion, defense counsel indicated that she intended to impeach Singh with evidence that his

pursuit of appellant violated store policy and that he was fired shortly afterwards because he subsequently sold alcohol to and stole money from an intoxicated customer.

Appellant wanted to introduce the evidence through the testimony of Singh's former manager. The prosecutor objected under Evidence Code section 352, arguing presentation of the evidence would distract the jury with an evidentiary dispute regarding the reasons Singh was fired. Defense counsel argued that if Singh denied that his termination was based on the alleged misconduct, it would take no more than 10 minutes of testimony from Singh's manager to respond.

The trial court excluded the evidence because its introduction was likely to consume an excessive amount of time and distract the jury, and because Singh's prior conviction for an offense involving dishonesty directly attacked his credibility. The trial court stated: "One of the settings that we're dealing with here is the fact that Mr. Singh does have this prior false use of an access or ATM card conviction that will be available for cross-examination, and that's a pretty significant conviction. It clearly involves dishonesty. So you get a 'big hit,' so to speak, on his credibility by being able to put that particular misdemeanor in. And if you weren't able to do that, conceivably the court would view the subsequent firing information a little differently; but given the fact that you can attack Mr. Singh's credibility directly with that particular conviction and given the fact that we don't really know but it sounds quite an elaborate project to restore Mr. Singh's . . . credibility if there is the testimony that you have outlined, [defense counsel], and given the fact that the conduct that you're talking about occurred after the alleged acts in this case, I find that the potential exploration into . . . the reasons why he was fired . . . would consume an excessive amount of time and would be highly distracting to the jury." The court emphasized it did not make the ruling "because it might be difficult to restore Mr. Singh's credibility. My reason for mentioning that is I think that would take a large amount of time and run down a lot of dark alleys and be highly distracting to both sides really and specifically to the jury to get into that area, and I think the district attorney would be entitled to try to restore his credibility; but I think that effort itself would take an excessive amount of court time, and the effort in doing so would be unduly

distracting.” During trial, the court denied defense counsel’s request to cross-examine Singh about why he was fired.

Under Evidence Code section 352, “[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” The trial court’s “exercise of that discretion ‘must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.’ ” (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) It was not unreasonable for the trial court to conclude the dispute regarding Singh’s termination had the potential to consume excessive time at trial and distract the jury from the evidence relating to the current offense. Although defense counsel asserted that presenting the manager’s testimony would take only 10 minutes, the prosecutor indicated he would likely present evidence in rebuttal and there also was a surveillance video of the incident resulting in Singh’s termination. On the other side of the balance, it was reasonable for the trial court to treat the proffered impeachment evidence as cumulative and less probative than the evidence that Singh had been *convicted* of a theft reflecting dishonesty. (*People v. Price* (1991) 1 Cal.4th 324, 412.) Appellant has failed to demonstrate the trial court abused its discretion.

In any event, any error in exclusion of the proffered evidence was harmless. (*People v. Rodrigues, supra*, 8 Cal.4th at p. 1125.) At trial, Singh admitted he was convicted of “unlawful possession of another person’s access card or checks.” He also admitted that his pursuit of appellant violated his employer’s policy against chasing shoplifters. In closing, defense counsel argued to the jury that Singh is “a convicted liar.” Some members of the jury apparently did have doubts as to Singh’s credibility because the jury was unable to reach a verdict as to the assault with a knife charge, which Ali did not observe. On the other hand, the robbery and assault with a bottle charges were supported not only by Singh’s testimony but also the eyewitness testimony of Ali and the physical evidence described by the police. There was no eyewitness testimony

supporting appellant's claim of self-defense. Ali, who did not know Singh before the incident, denied seeing Singh attack appellant. It is not reasonably probable that a result more favorable to appellant would have resulted had the jury heard the excluded evidence, which would not have undermined Ali's testimony or the physical evidence. (*People v. Cole* (2004) 33 Cal.4th 1158, 1195.) For the same reasons, even if we were to treat exclusion of the evidence as a violation of appellant's federal constitutional right to present a defense and confront witnesses, any error was harmless beyond a reasonable doubt. (*Ibid.*)

II. *Appellant's Conviction for Robbery is Supported by Substantial Evidence*

Appellant contends there was insufficient evidence to support the robbery conviction because, at the time of the attack, Singh lacked "the necessary authority or responsibility with respect to the goods to be a robbery 'victim,' " since Singh's actions violated a store policy prohibiting pursuit of shoplifters.

"Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) Although the victim's possession of the object of the robbery is a necessary element of the offense, " '[t]he theory of constructive possession has been used to expand the concept of possession to include employees and others as robbery victims.' " (*People v. Scott* (2009) 45 Cal.4th 743, 750 (*Scott*).) To support his contention that Singh did not have constructive possession of the beer bottles at the time of the assault, appellant relies on *People v. Frazer* (2003) 106 Cal.App.4th 1105, 1115 (*Frazer*), which held: "[T]he proper standard to determine whether a robbery conviction can be sustained as to an employee who does not have actual possession of the stolen property is whether the circumstances indicate the employee has sufficient representative capacity with respect to the owner of the property, so as to have express or implied authority over the property. Under this standard, employee status does not alone as a matter of law establish constructive possession. Rather, the record must show indicia of express or implied authority under the particular circumstances of the case."

Appellant contends that, because Singh violated store policy in pursuing appellant, Singh did not have authority over the bottles at the time he confronted appellant. However, after appellant submitted his opening brief, the California Supreme Court disapproved *Frazer* in *Scott, supra*, 45 Cal.4th at pages 751-752, 756-757. The court rejected *Frazer*'s focus on the employee victim's authority over the property in the particular circumstances of the case. (*Scott*, at pp. 751-752.) Instead, the court held that employees are deemed to be in constructive possession of an employer's property during a robbery "based upon their status as employees and without examining whether their particular duties involved access to or control over the property stolen." (*Id.* at p. 752.) Thus, "the prosecution may meet its burden of proving the element of possession by establishing that the alleged victim, from whose immediate presence the property was taken by force or fear, was an employee of the property owner and was on duty when the robbery took place." (*Id.* at p. 756.)

It is undisputed that Singh was an on-duty employee of the gas station convenience store at the time appellant took the beer bottles. Appellant contends Singh was no longer on duty once he pursued appellant in violation of store policy. We disagree. Although violation of the store policy may have created a basis for discipline against Singh by his employer, appellant cites no authority that violation of the policy meant Singh was no longer on duty within the meaning of *Scott*. Such a conclusion would be contrary to *Scott*'s focus on the defendant's culpability, instead of the particulars of the victim's employment relationship. (*Scott, supra*, 45 Cal.4th at p. 755.) *Scott* explained that its construction of the robbery statute "is consistent with the culpability level of the offender and the harm done by his or her criminal conduct. As a matter of common knowledge and experience, those who commit robberies are likely to regard all employees as potential sources of resistance, and their use of threats and force against those employees is not likely to turn on fine distinctions regarding a particular employee's actual or implied authority." (*Ibid.*)

III. *The Jury Instruction on Robbery Was Adequate*

Appellant contends the trial court's jury instruction on robbery was inadequate because it prevented the trier of fact from considering defenses that Singh did not have authority over the stolen property and that appellant had abandoned the stolen property before he used force in self-defense.

As for a defense based on Singh's lack of authority, the trial court instructed the jury on robbery of an employee with the language of CALCRIM No. 1600, which reads in part: "A store employee may be robbed if property of the store is taken, even though he or she does not own the property and was not, at that moment, in immediate physical control of the property. If the facts show that the employee was a representative of the owner of the property and the employee expressly or implicitly had authority over the property, then that employee may be robbed if property of the store is taken by force or fear." This instruction *did* permit the jury to consider an argument based on Singh's lack of authority at the time of the assault.

As for an abandonment defense, the jury heard testimony that appellant told Apley that he put the beer bottles on the ground during his confrontation with Singh, in an attempt to return them. Appellant does not explain why the court's instructions to the jury foreclosed a defense based on abandonment. The court instructed the jury the People were required to prove that "When the defendant used force or fear to take the property, he intended to deprive the owner of it permanently / or to remove it from the owner's possession that the owner would be deprived of a major portion of the value or enjoyment of the property." Under this instruction, no juror who concluded that appellant had abandoned the beer bottles could find that appellant's subsequent use of force was for the purpose of taking the bottles. There is no " 'reasonable likelihood' " that the jury understood the instruction to preclude an abandonment defense. (*People v. Kelly* (1992) 1 Cal.4th 495, 525-526.) Moreover, contrary to appellant's suggestion, the prosecutor's closing arguments were not inconsistent with an abandonment defense. Finally, to the extent appellant contends the court should have clarified its instruction further, any objection has been forfeited due to appellant's failure to request such

clarification below. (*People v. Rundle* (2008) 43 Cal.4th 76, 151, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

IV. *Appellant's Claims of Prosecutorial Misconduct and Ineffective Assistance of Counsel*

Appellant contends the prosecutor engaged in misconduct during closing argument by improperly vouching for the credibility of witnesses and by focusing the jury's attention on punishment in referring to a lesser-included-offense.

Appellant's claims have been forfeited. "To preserve a claim of prosecutorial misconduct during argument, a defendant must contemporaneously object and seek a jury admonition." (*People v. Bonilla* (2007) 41 Cal.4th 313, 336.) Defense counsel failed to make appropriate objections to three of the four instances of alleged prosecutorial misconduct: (1) the prosecutor's argument that Singh was truthful and that there were no facts controverting that he was hit with a bottle, (2) the prosecutor's argument that the police had no motive to lie, and (3) the prosecutor's reference to the lesser included offense of petty theft. Defense counsel did make an appropriate objection to the fourth instance of alleged misconduct, the prosecutor's assertion that "Apley testified truthfully," but counsel did not request a curative admonition. Accordingly, each claim of prosecutorial misconduct has been forfeited.

Appellant contends the failures to object and request admonitions constituted ineffective assistance of counsel. However, " 'Failure to object rarely constitutes constitutionally ineffective legal representation . . . ' [Citation.] . . . '[I]f the record on appeal fails to show why counsel acted or failed to act in the instance asserted to be ineffective, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim must be rejected on appeal.' " (*People v. Huggins* (2006) 38 Cal.4th 175, 206; see also *People v. Wilson* (1992) 3 Cal.4th 926, 936.) This is not a situation in which there could be no satisfactory explanation for the alleged failures to object. Each of the prosecutor's allegedly objectionable arguments was made in passing and subject to different interpretations. As in *Huggins*, defense counsel "could have preferred not to draw the jurors' attention to

particular comments by the prosecutor by objecting to them” and requesting curative admonitions. (*Huggins*, at p. 206.) We cannot find on this record that appellant received ineffective assistance of counsel.

V. *The Trial Court Did Not Err in Failing to Conduct a Hearing Regarding Appellant’s Competency*

On March 5, 2008, after the jury returned its verdicts but before sentencing, appellant moved for substitution of counsel (a *Marsden* motion).² Appellant stated in a supporting declaration: “I have not understood one thing about this court or the process of its function. My lawyer has failed to instruct me in this area and I don’t feel that I was competent to stand trial and my lawyer was unable to see this and act upon this. I still don’t understand what’s going on.” In June 2006, before trial, appellant had been found incompetent to stand trial and committed to Napa State Hospital; he was found competent in May 2007. Appellant contends that, in light of his March 2008 declaration and his history of incompetence, the trial court should have declared a doubt as to his competency and conducted a competency hearing.

“A defendant is incompetent to stand trial if he or she lacks a ‘ ‘sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding— and . . . a rational as well as a factual understanding of the proceedings against him.’ ’ ” (*People v. Lewis* (2008) 43 Cal.4th 415, 524; see also § 1367 [a defendant is mentally incompetent to stand trial “if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner”].) “Both federal due process and state law require a trial judge to suspend trial proceedings and conduct a competency hearing whenever the court is presented with substantial evidence of incompetence, that is, evidence that raises a reasonable or bona fide doubt concerning the defendant’s competence to stand trial. [Citations.] The court’s duty to conduct a competency hearing may arise at any time prior to judgment. [Citations.] Evidence of incompetence may emanate from several sources, including the defendant’s demeanor, irrational behavior,

² *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

and prior mental evaluations. [Citations.] But to be entitled to a competency hearing, ‘a defendant must exhibit more than . . . a preexisting psychiatric condition that has little bearing on the question . . . whether the defendant can assist his defense counsel.’ ” (*People v. Rogers* (2006) 39 Cal.4th 826, 847; see also § 1368.) “A trial court’s decision whether or not to hold a competence hearing is entitled to deference, because the court has the opportunity to observe the defendant during trial. [Citations.] The failure to declare a doubt and conduct a hearing when there is substantial evidence of incompetence, however, requires reversal of the judgment of conviction.” (*Rogers*, at p. 847.)

In this case, appellant’s psychiatric history and his assertion of lack of comprehension in his declaration did not constitute substantial evidence of incompetence in light of appellant’s conduct at the hearing on his request for substitution of counsel. Appellant indicated he had consulted with his counsel and followed her “suggestions,” including counsel’s advice not to testify because of the risk that “it would turn around and not be for my best interest.”³ Appellant indicated he regretted the decision because “the truth never came out.” Appellant also expressed dissatisfaction with the limited amount of time he had to discuss the potential witnesses and evidence, the inadequacy of the investigation, and the frequent changes in his counsel and in the presiding judges. He also said he believed some of the prosecution witnesses had lied. Although appellant was at times inarticulate, particularly in explaining how additional investigation or evidence would have been exculpatory, his comments demonstrated he understood the nature of the criminal proceedings and did not indicate an inability to assist counsel. Notably, defense counsel did not express any doubts about appellant’s competence during the hearing. “Although trial counsel’s failure to seek a competency hearing is not determinative [citation], it is significant because trial counsel interacts with the defendant

³ On October 8, 2009, this court moved on its own motion to unseal, in its entirety, the transcript of the March 11, 2008, hearing on appellant’s *Marsden* motion. (See Cal. Rules of Ct., rule 8.160(f).) Because neither party has objected, the transcript is hereby ordered unsealed.

on a daily basis and is in the best position to evaluate whether the defendant is able to participate meaningfully in the proceedings [citation].” (*People v. Rogers, supra*, 39 Cal.4th at p. 848.)

The trial court did not err in failing to declare a doubt as to appellant’s competence and conduct a competence hearing. (*People v. Lewis, supra*, 43 Cal.4th at p. 526.)

VI. *The Trial Court Did Not Err During the March 2008 Marsden Hearing*

As previously mentioned, at the March 2008 *Marsden* hearing appellant expressed regret at having not testified during the trial. On appeal, appellant contends the trial court had a duty to make a further inquiry because appellant’s comments indicated “he was not allowed to exercise his constitutional right to testify in his own defense.” Appellant relies on his statement that “I didn’t get to take the stand. [Defense counsel] said it would turn around and not be for my best interest for me to take the stand. When clearly, I mean, nobody got the -- the truth never came out. No justice has been done in this courtroom.” In response, the trial court stated: “That’s a matter that gets determined between competent lawyers and their clients all the time. And highly competent lawyers across the country usually tell their clients something to the effect that unless there is some specific goal that can only be accomplished by your testimony, that you shouldn’t testify. The reason for that is the other side would be able to ask you any fair cross-examination questions and defendants very often go down in flames at that point. [¶] So she was advising you to exercise your Fifth Amendment right to remain silent. That doesn’t mean that she is incompetent.”

“ ‘When a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney’s inadequate performance. [Citation.] A defendant is entitled to relief if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citations].’ [Citations.]” (*People v. Fierro* (1991) 1 Cal.4th 173, 204.) “ ‘The decision whether to

grant a requested substitution is within the discretion of the trial court; appellate courts will not find an abuse of that discretion unless the failure to remove appointed counsel and appoint replacement counsel would “substantially impair” the defendant’s right to effective assistance of counsel.’ ” (*People v. Abilez* (2007) 41 Cal.4th 472, 488.)

The trial court did not abuse its discretion in failing to inquire further regarding the alleged denial of appellant’s right to testify. In response to appellant’s complaint, the trial court stated that competent counsel often advise their clients not to testify.

Appellant did not, in reply, indicate that his counsel had done more than merely advising him that he not testify. Elsewhere he referred to his counsel’s “suggestions.” In context, it was reasonable for the court to interpret appellant’s statement that he “didn’t get to” testify as a complaint regarding the advice he received and the jury’s unfavorable verdict, rather than as an indication that he had been prohibited from testifying or that he did not understand he had the option to testify. (See *People v. Nakahara* (2003) 30 Cal.4th 705, 719 [“vague allegations” reflecting “a difference of opinion over trial tactics and some generalized complaints regarding counsel’s performance” did not oblige the trial court to conduct a further hearing].)

VII. *Appellant’s Admission to the Strike Prior Was Not Voluntary and Intelligent*

After the jury returned its verdict, the trial court asked defense counsel how appellant planned to proceed on the prior strike allegation, trial of which had been bifurcated from trial of the current offenses. Defense counsel told the court in appellant’s presence, “Prior to the verdict, Mr. Johnston and I discussed that he would be admitting the prior to the [c]ourt.” The court responded, “All right. Thank you. The minutes will reflect that the strike is deemed admitted.” On appeal, appellant contends that the trial court erred in accepting his admission without providing appellant proper advisements regarding his rights. Appellant relies on *People v. Mosby* (2004) 33 Cal.4th 353 (*Mosby*), which held that, absent express advisements concerning the rights to jury trial, to confront witnesses, and to remain silent, a reviewing court must determine whether a defendant’s admission of a prior conviction was voluntary and intelligent under the totality of the circumstances. (*Id.* at p. 360; see also *People v. Howard* (1992) 1 Cal.4th

1132, 1178 [“[t]he record must affirmatively demonstrate that” a plea or admission “was voluntary and intelligent under the totality of the circumstances”].) ⁴

Respondent contends that appellant has forfeited this claim of error. Respondent cites language in *Mosby* indicating that a defendant’s right to a jury trial regarding the existence of a prior conviction is statutory and not based on the state or federal constitutions. (*Mosby, supra*, 33 Cal.4th at p. 360.) Respondent then cites to *People v. Vera* (1997) 15 Cal.4th 269, 272, which held that a defendant who fails to object to a court trial on prior prison term allegations forfeits a claim that the court failed to obtain the defendant’s waiver of jury trial. However, *Vera* addressed only forfeiture of an appellate claim based on denial of a jury trial; the court did not hold that a defendant may not raise on appeal a claim based on failure to receive advisements sufficient to ensure that his admission to a prior conviction is voluntary and intelligent.

Respondent’s argument that the totality of the record shows the admission was voluntary and intelligent is similarly unavailing. Respondent may be correct that the tactical focus of the defense was on the subsequent motion to strike the prior conviction under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. However, that proves little because defendant could have chosen both to have a trial on the prior conviction *and* file a *Romero* motion. This is a “[t]ruly silent-record” case (*Mosby, supra*, 33 Cal.4th at p. 361) because appellant received no advisements whatsoever from the trial court. In fact, the court took the admission from defense counsel rather than from appellant. “In such cases, in which the defendant was not advised of the right to have a trial on an alleged prior conviction, we cannot infer that in admitting the prior the defendant has

⁴ Although the issue is not raised in appellant’s briefs, at oral argument appellant also contended there was no admission by him at all, because he was never asked whether he admitted the prior strike allegation. In the plea context, section 1018 states in part: “Unless otherwise provided by law, every plea shall be entered or withdrawn by the defendant himself or herself in open court.” The California Supreme Court has stated that a plea need not be set aside under section 1018 if the defendant “authorized or adopted counsel’s statement of his plea.” (*In re Martinez* (1959) 52 Cal.2d 808, 815.) Because we conclude any admission was not voluntary and intelligent, we need not decide whether appellant adopted his counsel’s assertion that he admitted the allegation.

knowingly and intelligently waived that right as well as the associated rights to silence and confrontation of witnesses.” (*Id.* at p. 362.)

The record does not affirmatively demonstrate that appellant made a voluntary and intelligent admission. Thus, the matter must be remanded for redetermination of the prior strike conviction allegation.⁵

DISPOSITION

The sentence in this case is reversed and the cause is remanded for redetermination of the prior strike conviction allegation and for resentencing. In all other respects, the judgment is affirmed.

Simons, J.

We concur:

Jones, P. J.

Needham, J.

⁵ At oral argument, respondent argued for the first time that any error as to the admission was harmless because there was adequate proof of the prior strike conviction. That argument is misplaced. “The focus is not on whether a prior would have been found true, but on whether the defendant knew of his constitutional rights.” (*People v. Stills* (1994) 29 Cal.App.4th 1766, 1770.)